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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1952

No. 652

WATERMAN STEAMSHIP CORPORATION, a corporation,

Petitioner,

vs.

SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD., a corporation, and Tug SEA FOX, INC., a corporation, on their own behalf and on behalf of the master, officers and crew of the Tug SEA FOX,

Respondents.

BRIEF FOR RESPONDENT SHIPOWNERS AND MERCHANTS TOWBOAT CO., LTD., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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STATEMENT OF THE CASE.

Petitioner engaged respondent's tug *Sea Fox* to tow petitioner's dead ship, *Herald of the Morning,* from San

Francisco, California, to Everett, Washington. When the tug and tow were off the coast of Oregon, a very heavy storm was encountered, with tremendous seas and gale winds. The tow line parted after many hours of excessive strain, and the *Herald* was left adrift, without power, in danger of going ashore and being totally lost.

Thereafter, respondent's tug, in company with other vessels, rendered services which were obviously salvage, and, by strenuous and skilful efforts, managed to secure control of the *Herald* and tow her safely into port. Salvage libels were filed by respondent as owner of the tug *Sea Fox,* and by another corporation owning two other vessels which had participated in the rescue. These were consolidated for trial, which lasted for several days. Personnel from all three tugs and from the *Herald* testified in person in court, and depositions were introduced by petitioners from the commanding officers of two Coast Guard vessels which had also assisted to some extent in the rescue.

Although petitioner (respondent below) raised a number of issues in the District Court, its basic defenses were two in number: (1) that the *Sea Fox* could not claim salvage in any event, because it had contracted to tow the *Herald* from San Francisco to Everett; (2) that the *Sea Fox* could not claim salvage because its negligence brought about the peril of the *Herald* which gave rise to her need for salvage services. The latter, of course, involved purely factual issues as to the conduct of the *Sea Fox* and the circumstances of the voyage.

At the end of the trial both sides filed written briefs, and the District Judge then rendered an able and exhaustive opinion in which he discussed the law and the issues, stated the facts which he considered proved by the evidence, and ordered judgment for the salvors against petitioner. (R. 38-54. Reported in 98 F. Supp. 123.)

Findings were proposed by this respondent as the successful party, and petitioner made objections and counter-proposals. After a hearing in open court on the form of findings (R. 466-77), several changes were ordered made in the findings first proposed by this respondent, and those amended findings were then adopted and signed by the trial judge.

Petitioner then appealed and argued that the findings below were erroneous and unsupported by the evidence. The Court of Appeals for the Ninth Circuit affirmed the decree, stating properly that "the question is essentially one of fact," and ruling that "These findings support the award, and we are of opinion that they are not clearly erroneous, *or erroneous at all,* for that matter." (199 F. (2d) 600 at p. 601.)

Petitioner's application for certiorari attacks the finding that the *Herald's* peril was not caused by the tug's faults, and thus seeks a review in this Honorable Court of the evidence on which the District Court and the Court of Appeals found and held in favor of respondent. No issue of law is presented, and a third trial on the facts is really all that petitioner is asking.

Under these circumstances, the well settled rule of this Court as to the concurrent findings of the courts below applies, viz., that this Court will not undertake to review factual findings made and approved by two courts.

In the admiralty case of *Just v. Chambers,* 312 U.S. 383 at 385, 85 L. Ed. 903 at 905, this Court said:

> "In support of the judgment of the Circuit Court of Appeals, respondents asks us to review the evidence with respect to the cause of the claimant's injuries and the breach of duty by the shipowner, contending that the evidence was insufficient to support the findings. Applying the well-established rule, we accept the concurrent findings of the Courts below upon these matters (Texas & N. O. R. Co. v. Brotherhood of R. & S. Clerks, 281 U.S. 548, 558, 74 L. Ed. 1034, 1039, 50 S. Ct. 427) and we confine our attention to the question of the survival of the causes of action."

The same rule is enunciated in *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.,* 321 U.S. 275 at 278, 88 L. Ed. 721 at 724, and in *Anderson v. Abbott,* 321 U.S. 349 at 356, 88 L. Ed. 793 at 799, and was more recently stated as follows:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.,* 336 U.S. 271 at 275, 93 L. Ed. 672 at 677.

That petitioner is merely seeking one more review of the evidence, in defiance of the rule just cited, will be demonstrated in the remaining portions of this brief.

THE ISSUES.

It is difficult to segregate and list the issues which petitioner is attempting to raise, since they are stated in so many different ways in so many different places in the petition and brief in support thereof.

Under a "Questions presented" heading in the petition (pp. 6-10), petitioner lists *five* "questions," with several subdivisions for each of the first three. Under the heading, "Reasons relied upon for issuance of writ," the petition (pp. 10-14) lists *nine* "reasons." The brief in support of the petition (pp. 21-22) specifies *four* "errors" which the Court of Appeals is alleged to have made.

These various lists of "errors," "questions" and "reasons" are redundant and overlapping almost to the point of confusion. We propose to answer very briefly the "reasons for issuance of writ" set forth at pages 10 to 14 of the petition, and then to comment on the four "specifications of error" which are discussed in petitioner's supporting brief.

I.

NO VALID REASON FOR ISSUANCE OF WRIT OF CERTIORARI HAS BEEN PRESENTED.

Petitioner's first five "reasons" all relate to the so-called *Pennsylvania* rule as applied to the admitted fact that the license held by the master of the tug did not cover the particular waters in which the voyage in question was made. (The master had been operating this tug for six years (R. 231) and had previously towed eight

other vessels up the west coast, including two ships of the size of the *Herald* to Washington ports. He held a license for inland waters, however, rather than for the high seas.) The so-called *Pennsylvania* rule, first enunciated in *The Pennsylvania,* 86 U.S. 125, 22 L. Ed. 148, is that a ship in collision which has violated a statute governing navigation has the burden of showing that her statutory violation could not have been a cause of the collision, in order to escape being held at fault.

Petitioner's first five "reasons" are not supported by the record, and are self-contradictory on their face. Thus the first reason advanced is that the Court of Appeals decided an important question of law which has *not* been, but should be, decided by this Court. The second reason is said to be that the decision of the Court of Appeals conflicts with decisions which the Supreme Court *has* made.

We concede that, in a collision situation, a vessel guilty of statutory fault (i.e., of violation of a statute laying down the "Rules of the Road") must prove that her violation of the statute *could* not have been a cause of the collision. (The *Pennsylvania* rule.) Whether the same rule applies to *non*-collision situations is open to grave doubt, to say the least, since collision cases are *sui generis* in a sense, with rules which need not necessarily apply to other situations. This was recognized in *Halcyon Lines v. Haenn Ship C. & R. Co.,* 342 U.S. 282, 96 L. Ed. 318, 72 S. Ct. 277, where the collision doctrine of equal division of damages and contribution between the owners of ships mutually at fault was held applicable only to collision

cases, and not to maritime cases involving non-collision situations.

Just as the cited case refused to upset the common law rules on contribution between joint tort feasors by extending the collision rule on that subject, it is arguable that the usual rule on proving proximate cause is not to be upset by extension of the radically different collision rule.

The answer to petitioner's first three reasons, however, is that the decision of the Court of Appeals *does not decide at all on the legal issue as to the applicability of the "Pennsylvania rule."* The issue did not *need* to be, and *was not, decided.*

The opinion of the trial judge indicates his *doubt* that the *Pennsylvania* rule as to the burden of proof on causation applies to a salvage situation and a lack of the proper license, but goes on to say:

> "Assuming, however, that in this case the rule is applicable, *the burden of proof has been carried,* because the evidence *clearly* shows that the *Herald* was set adrift and carried into a position of danger *solely by violence of the storm."* 98 F. Supp. 123 at 129-30. (R. 51.)

The Court of Appeals found that the findings "are not clearly erroneous, or erroneous at all, for that matter." With reference to the *Pennsylvania* rule, it stated, in effect, that the applicability of that doctrine to the case at bar need not be decided, since the findings exonerated libelant (respondent here) even if the rule were applicable.

The language of the appellate decision makes this quite clear:

> "It is argued that the so-called rule of *The Pennsylvania,* 19 Wall. 125, 86 U.S. 125, 22 L. Ed. 148, is applicable here, namely that where a ship has committed a positive breach of a statute she must show not only that probably her fault did not contribute to the disaster, but that it did not and could not have done so. The trial court, assuming the applicability of the rule, held that the burden of proof had been met since it was clearly shown by the evidence that the *Herald* was set adrift and carried into a position of danger solely by the violence of the storm. It found also that, in addition to Captain Sommer, the *Sea Fox* was officered by two others, one of whom had an unlimited master's ocean going license and the other an unlimited mate's ocean license; and that in fact all three were experienced and competent men." (199 Fed. (2d) at p. 601.)

That holding does *not* pass on the applicability of the *Pennsylvania* rule at all, but leaves the legal issue open to determination in a proper case. It does *not* conflict with *any* decision in *any* court, then, and the assumed "conflict of decisions" relied on by petitioner for certiorari simply does not exist.

"Reason number 4" is stated to be that the decision below conflicts with other cases from other circuits, in which it has been held that violation of statutory manning requirements is a statutory fault. There is no such "conflict" here. The Court of Appeals did not hold that Capt. Sommer's failure to have an off-shore license was not a statutory fault. It recognized and accepted the fault, but

approved the finding that such fault was not and *could* not have been a cause of the *Herald's* difficulties.

"Reason number 5" is a gross misstatement and an unwarranted reflection on the Court of Appeals. Petitioner says that the Court of Appeals "failed to apply the *Pennsylvania* rule and, without review, consideration or question, accepted the trial court's statement that if the *Pennsylvania* rule be deemed to apply, the burden of proof thereunder had been met by respondent." (Petition, p. 12.) We have already shown that the Court of Appeals did *not* fail to apply the *Pennsylvania* rule, but held that *it had been met and satisfied on the facts.*

There is no justification for the charge that the appellate court accepted the trial court's statement "without review, consideration or question." The case was vigorously briefed and argued, and the opinion of the Court of Appeals states that the findings of the District Court were not clearly erroneous "or erroneous at all."

Reasons 6 and 7 relate to the findings and the so-called "appeal proofing" which so engrosses and obsesses petitioner. Once again, petitioner assumes and charges that the Court of Appeals failed to review the findings, and merely accepted them without comment. Nothing in the record supports the charge that the Court of Appeals failed in its duty to review the record and/or to consider the arguments made before it by petitioner.

Reasons 8 and 9 say that the Court of Appeals was wrong in giving full weight to findings prepared by counsel and in holding that they were subject to review only if there was clear error. We will discuss this aspect when

we reply to petitioner's first two "specifications of error" in its supporting brief. Suffice it here to say that the opinion of the Court of Appeals does *not* state or hold that it was giving any undue weight to the findings.

II.

THE COURT OF APPEALS DID NOT ERR IN APPROVING THE DISTRICT COURT'S FINDINGS OF FACT.

Petitioner's brief in support of its petition (pp. 23-41) argues several points, which resolve into three contentions:

(1) That the findings of the District Court were improperly prepared and are entitled to no weight.

(2) That many of the findings are really conclusions of law.

(3) That the findings are contrary to the evidence, in finding that no fault of the tug could have contributed to the peril which necessitated the salvage services.

We reply to those contentions as follows:

(1) The findings were properly made and are entitled to affirmance.

Petitioner cites cases which say that findings prepared by winning counsel and accepted by the trial court without modification are not entitled to the same weight as findings drafted by the court itself. We shall point out, in a moment, that no such situation is here presented. Before doing so, however, let us note that the cited cases do *not* hold that such findings are automatically wrong, or must

be reversed. In each of the cited cases the appellate court found that the evidence did not support the findings, and reversed on that ground. The basic question there, as always, was whether the evidence supported the findings. As this Court has said,

> "The defendants finally object to the findings on the ground that they were mainly taken verbatim from the government's brief. The findings leave much to be desired in light of the function of the trial court. See *U. S. v. Forness* (CCA 2nd) 125 F. (2nd) 928, 942, 943. *But they are none the less the findings of the District Court. And they must stand or fall depending on whether they are supported by evidence. We think they are.*"
>
> *U. S. v. Crescent Amusement Co.*, 323 U.S. 173 at 184-5, 89 L. Ed. 160 at 169.

The instant case is *not* one where the lower court simply announced a decision and then blindly signed findings prepared by prevailing counsel. The record shows that the issues were carefully considered and decided by the District Judge, who wrote an able and exhaustive opinion. The findings followed the substance and intent of that opinion, and were settled only after losing counsel had been heard in court on the form of the findings. Thus petitioner's complaint is really just the usual one of any losing party that the trial court decided against him.

The opinion of the trial court (R. 38-54; reported in 98 F. Supp. 123) discusses the facts and the issues quite fully and fairly, and passes on each issue raised by petitioner as the respondent below. The statement in the opinion that, if the *Pennsylvania* rule applies, libelant

carried the burden of proof, is not a "dictum" as petitioner suggests, but is a finding made by the trial court *on its own initiative* after considering the evidence and the trial briefs. The formal findings merely follow that opinion, in substance.

The reporter's transcript on settlement of findings (R. vol. II, pp. 466-477) shows that petitioner's views as to the form they should take were fully presented to the lower court, and that changes were ordered to be made in the form first lodged by libelant below. In other words, the trial judge did not blindly accept libelant's proposals, but considered the issues carefully, and deliberately selected the form to be used, *in accordance with the previous opinion.*

In fact, that transcript of the settlement of findings shows that petitioner was mainly trying to get some conclusions of law added to the findings, in the hope that a reversible error would result, and that *petitioner had and made no objection to the basic method used in drafting the findings.* Petitioner's counsel expressly so stated in open court when the findings were being settled:

> "*Mr. Tetreault.* If I may continue. There are a number of items of fact as to which there are no specific findings either in the opinion or in Mr. McKeon's proposal. Mr. McKeon's proposal, so far as findings of fact are concerned, was primarily a recapitulation of the articles in his libel, which is *proper,* and *to which I have no objection.*" (R. Vol. II, p. 472.)

The entire history of this case demonstrates that both courts below were fully cognizant of the issues, and

reached a decision thereon of their own volition after hearing from both parties.

(a) After considering the evidence and the trial briefs, the District Judge rendered an opinion in which he outlined the facts and issues and announced his finding and decision in his own language.

(b) Prevailing counsel then proposed formal findings which followed the substance and intent of that opinion.

(c) Losing counsel then made objections and suggestions as to the form of the findings, and was given an opportunity to express his views in open court.

(d) At that hearing the court ordered some changes in the form of findings first proposed by libelant, after petitioner's counsel had presented his criticisms and counter-proposals, and *after he had stated that he had no objection to the general method used by the prevailing party in drafting its proposed form of findings.*

(e) The Court of Appeals did not give these findings any undue or improper weight, or abdicate its function as a reviewing court. It considered the record and the arguments of counsel, and decided that the findings were "not clearly erroneous, or erroneous *at all,* for that matter."

(2) The findings of fact are just that, and involve no conclusions of law.

Petitioner's second objection to the findings is that they are really conclusions of law. Petitioner is confusing

a finding of ultimate fact with a conclusion of law. The question of whether or not the acts and omissions of the tug were or could have been a cause of the tow line breaking and putting the *Herald* in danger is solely and exclusively a question of fact.

Basically, petitioner contended that certain acts and omissions of the tug were negligent, and that these negligent acts and omissions caused the danger from which the *Herald* then had to be rescued. We know of no statute, text, decision or rule of law which could possibly help a court to decide whether the alleged absence of a full-length spare towing cable or the alleged disregard of storm warnings caused or could have caused the *Herald's* troubles. Such issues are purely and simply issues of fact, depending on all the facts and circumstances.

With respect to the tug master's lack of a license for these particular waters, the question of the severity of burden of proof is a legal question. If the *Pennsylvania* rule be applied to put the burden on this respondent to show that the absence of the required license could not have contributed to the peril of the *Herald,* the question of whether respondent bore that burden successfully is a question of fact, depending on what happened and what was done at the times concerned.

Neither court below decided for libelant (respondent here) on the basis that the *Pennsylvania* rule did not apply to libelant. On the contrary, the District Court found that libelant had borne the *Pennsylvania* burden successfully (i.e., had proved that the "statutory fault"

could not have been a cause), and the Court of Appeals approved and affirmed this finding.

On the issue of causation, the courts had to consider what *happened* on this voyage, and whether anything *done* or *omitted* by the tug and her personnel was or could have been a cause of the *Herald's* getting into danger. Those were purely factual matters, on which both lower courts found against petitioner.

(3) The courts below correctly found that no fault of the tug could have contributed to the peril which necessitated the salvage services.

Petitioner attempts to reargue its charges below that the tug was guilty of causative fault in such respects as disregarding storm warnings, proceeding with a broken fair lead traveler, and failing to have a full length "insurance wire" aboard. Both courts below found that none of these things had anything to do with the *Herald's* difficulties. These are factual issues on which petitioner is asking for a third review in this Court. We understand that such is not a proper basis for *certiorari*, and will therefore make only brief comments on those issues.

(a) "*Disregard of storm warnings.*" Petitioner evasively tries to give the impression that the tug left a safe harbor in the teeth of storm warnings, or failed to put into a port of refuge when warnings were received by radio at sea. There is not one fact in the record to support this charge.

The voyage began in fine weather from San Francisco (R. 108). Enroute, a tow line broke, and a brand new one was then installed at Drake's Bay. The voyage was

then resumed in fine weather (R. 110), and so proceeded for several days. When storm warnings were broadcast, the tug and tow were off the Oregon coast, and the only geographically available refuge was the Columbia River (R. 151). The entrance to the river is over a bar which is a recognized hazard in rough weather, particularly for a tug with a dead tow.

As the District Court opinion points out, "four experienced tug masters testified that the weather conditions from November 13th through the 16th were such that it would not have been feasible for the tug to try to take the *Herald* across the Columbia River bar. Under all the circumstances, it was but good seamanship for the *Sea Fox* to head out to sea to try to ride out the storm." (R. 48-49; 98 F. Supp. 123 at 129.)

After receiving storm warnings, the *Sea Fox* radioed for help to stand by, and a Coast Guard vessel was on hand and standing by over 24 hours before the tow line broke. (R. 409, 412.) The tug thus did all it could, and did not "disregard" storm warnings.

Petitioner refers to the "strikingly similar factual situation" in *Blumenthal v. Atlantic C. L. Ry.* (2d Cir.), 139 F. (2d) 288, in which it was held that act of God is no defense if negligence existed which allowed or caused the act of God to bring about the damage. The facts in that case are so strikingly *dis*-similar to this case that the citation can hardly have been seriously intended.

In the *Blumenthal* case a tug took its tow out of a sheltered harbor in the teeth of warnings that a hurricane was at hand. In the case at bar, as we have seen, the

voyage began in calm weather and continued for several days before any storm warning was broadcast. When the warning was received, the flotilla was out at sea, there was no available port of refuge, and there was nothing to do but head away from a lee shore and try to ride out the storm.

(b) *Absence of an "insurance wire" on the tug.* The tug resumed the voyage from Drake's Bay towing the *Herald* on a brand new 1200-foot towing cable or "wire," with a 600-foot spare wire on the tug. No one testified that this spare was inadequate or improper, or that the tug violated approved practice. More importantly, however, the evidence showed conclusively and dramatically that the presence of a dozen 1200-foot spare wires on the tug would have been of no help.

The *Herald's* danger arose when and *because* the tow line from her bow to the tug parted in a full gale. The presence or absence of spare wires on the tug had nothing to do with causing this break. Thereafter, several vessels on the scene tried to get another line onto the *Herald,* but with no immediate success. In fact, the tug *Neptune* was sunk by collision with the *Herald* while maneuvering near her in an effort to pass a line. (R. 199-206.) When the weather permitted, the Coast Guard then got a line aboard the *Herald* and gave the other end to the *Sea Fox,* which thus regained control of her tow as soon as the weather allowed. What the absence of a 1200-foot spare wire on the tug had to do with the *Herald's* difficulties is difficult to see, and the District Court properly ruled that:

> "Nor does the record disclose in what way having an extra full-length tow wire on board would have enabled the *Sea Fox* to do anything she did not do, since the storm that caused the tow wire to part also made it impossible to get any line aboard the *Herald.*" (R. 49; 98 F. Supp. 123 at 129.)

(c) *The broken fair lead traveler had nothing to do with the case.* After leaving San Francisco, the tug's fair lead traveler broke, and she resumed the voyage from Drake's Bay without being able to repair it. This "traveler" is a device for spreading the tow cable evenly back and forth on the drum of the tug's towing winch when the cable is being wound onto the drum (so that it will not bunch, but will go on evenly and smoothly, like a spool of thread).

During the voyage, however, the tow line had to remain out, pulling on the *Herald,* and there was no occasion to reel in, hence no need for the fair lead traveler. Furthermore, over twenty-four hours before the tow line broke, the tremendous strain on the tug's towing engine stripped the teeth on the drum, which could no longer be held still. To prevent it turning and the end of the wire being lost, it was necessary to wedge a large piece of metal between the stationary frame of the winch and the drum itself. (R. 112-113; 169-70.) From then on, of course, it was *impossible* to take in or let out line, and the fair lead traveler would have been of no possible use whatever, even if in perfect operating order.

III.

THE COURTS BELOW CORRECTLY FOUND AND HELD THAT THE MASTER'S LACK OF THE CORRECT LICENSE COULD NOT HAVE BEEN A CAUSE OF THE HERALD'S NEED FOR SALVAGE SERVICES.

We have conceded that tug captain Sommers' license was for inland waters rather than the high seas. No one, including the courts below, has said that this was not a technical violation of a statutory requirement. The issue is whether or not this lack of an offshore license had anything to do with the *Herald's* going adrift into danger when the tow line broke after being severely strained for many hours in a full gale at sea.

On that issue petitioner argues that the *Pennsylvania* rule required the salvor to show that this technical statutory violation could not have been a contributing cause of the *Herald's* difficulties, and that the salvor failed to carry that burden of proof. Petitioner's brief in support of its application contends that the Court of Appeals ruled that the *Pennsylvania* rule did not apply, and petitioner talks of this "novel and vicious precedent."

As we have already pointed out, the Court of Appeals made no such ruling, "vicious" or otherwise. It approved and confirmed the finding that, assuming the rule to apply, the burden had been met. The decision does *not* repudiate the *Pennsylvania* rule, or hold it inapplicable to a salvage case, nor does it expressly hold the rule applicable. There was no need to pass on the legal issue because, as a matter of fact, the "violation" could not have been a causative factor, hence the salvor was

entitled to an award, even assuming the rule applied. Such a decision was entirely proper to make, and constitutes a factual finding which rendered the legal issue moot. On such a finding, any dogmatic statement as to the applicability of the *Pennsylvania* rule would have been pure dictum, at most.

Petitioner's criticism of the decision by the Court of Appeals as laying down bad law, then, is wide of the mark. No such decision had to be made. No such decision *was* made. The case was decided on the *facts,* and has nothing to do with the question whether the *Pennsylvania* rule applies to such a non-collision situation as a salvage case.

Petitioner's next criticism is that, on the record, it was error to find that the captain's lack of the appropriate license could not have been a cause of the troubles of the *Herald.* This is a factual issue on which both the District Court and the Court of Appeals concurred in finding in respondent's favor. A brief summary of the record is all that need be presented here to show that the finding was proper.

The tug's job was to tow a dead ship up the coast. It called for an experienced *tug* master, not just a master. There are probably several thousand men who hold the proper license to act as captain of a ship on the high seas, but who would have been incompetent to take on this *towing* job, because they had no training or experience with tugs and tows. Capt. Sommers had six years' experience on this tug, and had taken eight other tows up the coast successfully.

A piece of paper has no magic power to confer knowledge or experience, or to govern the behavior of inanimate objects. It cannot still the winds and calm the waves. What was needed was not a particular kind of *document*, but a particular kind of *man*—a competent and experienced tug master. And, in judging his conduct, the presence or absence of a license has no weight or bearing. The question was solely what he did and what he should have done. It is not the law that acts which would be proper on the part of a licensed officer somehow become improper if done by an unlicensed man.

On the *facts* as to how the tug was operated, the situation was this:

1. First Mate Reichel of the tug had an unlimited master's license for any ocean (R. 104), and the second officer had an unlimited first mate's license for any ocean. (R. 360.)

2. Capt. Sommers had ocean going experience on this tug, and six years' towing experience. He did hold a master's license for inland waters.

3. The trial court's opinion, based on their testimony in open court, expressly states that these three tug officers were experienced and competent men. (R. 50.)

4. Nothing done or omitted by the tug could have had anything to do with the *Herald's* troubles.

5. The *Herald's* danger arose when and because the tow line parted in a full gale, leaving her adrift without power.

6. Salvage services were promptly and efficiently rendered thereafter as soon as the weather permitted.

Those are the *facts*, and on those facts the District Court found that the tug had successfully met the *Pennsylvania* burden of proof. The Court of Appeals affirmed that finding. On that state of the record, petitioner is simply attempting to retry the facts for a third time, and has stated no reason why *certiorari* should be granted.

CONCLUSION.

That a writ of *certiorari* should not issue herein is

Respectfully submitted,

Dated, San Francisco, California,
April 6, 1953.

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